



Date: January 29, 1998

Case No.: 97-INA-454

*In the Matter of:*

**FILIBERTO'S MEXICAN RESTAURANT,**  
Employer,

*On Behalf of:*

**LUIS VEGA-DE LA TORRE,**  
Alien.

BEFORE: Burke, Guill, Vittone  
Administrative Law Judges

**DECISION AND ORDER**

***Per curiam***

This case arises from an application for labor certification<sup>1</sup> for the position of Cook. The Certifying Officer (CO) proposed in a Notice of Findings (NOF) that it would deny certification because Employer "failed to document that there are no unlawful terms or conditions of employment, that the job is bona fide, and that there is a clear opening for a U.S. worker." (AF 7). In the NOF, the CO instructed Employer how it could rebut the findings therein, *to wit*,

- Document what Alien has been paid since May, 1993, including federal and state payroll tax returns, or amendments thereto;
- Documentation establishing Employer's ability to pay the wages offered, including tax returns and/or certified financial statements, and a copy of the firm's business license;
- Evidence that Employer would replace Alien with a U.S. worker, including evidence of the relationship between Alien and Employer, that Employer is a sole proprietorship, partnership or corporation including names and titles of all owners, ownership interest of Alien in Employer, relationship between Alien and any other owner.

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<sup>1</sup> Alien labor certification is governed by 8 U.S.C. §1182(a)(5)(A) and 20 C.F.R. Part 656.

(AF 7-10). The NOF also informed Employer that:

All deficiencies must be corrected or rebutted by [May 8, 1996]. If additional time is needed, an extension request must be submitted by the employer IN WRITING to this office . . . The request must be postmarked no later than the rebuttal due date. An extension request will be granted only if extenuating circumstances are cited by the employer; extensions are not automatically granted.

(AF 9 emphasis original).

By letter dated April 26, 1996, Employer, by and through its representative filed a request for extension of time until June 4, 1996 (AF 125). Employer cited the “considerable work that must be done with respect to the rebuttal to the Notice of Findings” as a reason for needing the extension. *Id.* Employer submitted rebuttal on May 12, 1996 (AF 64-70 and 42-63). The CO denied Employer’s request for extension of time on May 17, 1996, and noted “[p]artial or split rebuttals to the Notice of Findings are NOT ACCEPTABLE.” (AF 124 emphasis original). Thereafter, on May 21, 1996, Employer requested the CO to reconsider its motion (AF 3-4). In its request, Employer expanded on its reasons for needing the extension. Employer stated that because the rebuttal period was during tax season, and because its rebuttal had “serious potential tax consequences,” it needed to consult its accountant, who was unavailable until the first of May. On June 28, 1996, the CO wrote to Employer stating that it failed to rebut the NOF timely, and that the NOF automatically became the Final Determination of the Secretary.<sup>2</sup> (AF 2). Employer requested review by this Board and the CO forwarded the Appeal File to this Office.

In response to our Notice of Docketing, Employer filed a motion on September 2, 1997, to remand the matter to the Certifying Officer.

### **DISCUSSION**

The Board has held that it is an abuse of discretion to deny an extension request where an employer timely notifies the CO that its corrective action cannot be completed within the 35-day rebuttal period. *Alabama Reweaving*, 88-INA-294 (June 2, 1989). Employer’s request for an extension of time to file rebuttal was filed within the rebuttal period; i.e., ten days before rebuttal was due, however, the CO’s answer to Employer’s motion was dated after the rebuttal period (AF 5). The reason set forth by Employer for needing the extension was the “considerable work that must be done with respect to the rebuttal to the Notice of Findings.” (AF 6). Although this reason for requesting the extension may not in itself constitutes an “extenuating circumstance,” the CO’s actions were arbitrary. She did not timely respond to Employer’s motion. Moreover,

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<sup>2</sup> This letter, in effect, was the CO’s Final Determination.

prior to issuing a final determination letter, she was in receipt of both Employer's rebuttal<sup>3</sup> and its motion for reconsideration which explained more fully the rationale for the extension request.

Considering the nature of the deficiencies cited, Employer's inability to consult with its accountant constitutes an extenuating circumstance, such that the CO abused her discretion in not granting Employer's request for reconsideration of its request for an extension of time. *See Star Image Productions, Inc.*, 91-INA-182 (July 28, 1992).

### **ORDER**

Accordingly, it is **ORDERED** that the denial of labor certification is **VACATED** and the case is **REMANDED** to the CO with instructions to reopen the record and allow Employer a reasonable time in which to submit its rebuttal to the NOF. Thereafter, the CO shall consider all the evidence submitted to determine if labor certification should be granted or denied.

SO ORDERED.

Entered at the direction of the Board:

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TODD R. SMYTH  
Secretary to the Board of  
Alien Labor Certification Appeals

TRS/jlh

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis

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<sup>3</sup> Employer's rebuttal is dated after the rebuttal period, but was received prior to the CO responding to its request for an extension of time.

for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.